

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
MARIE CHAPARTEGUY)

For Appellant: Theodore K. Boynton
Attorney at Law

For Respondent: James C. Stewart
Counsel

O P I N I O N

This appeal is made pursuant to section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Marie Chaparteguy against a proposed assessment of additional personal income tax in the amount of \$21,799.58 for the year 1977.

Appeal of Marie Chaparteguy

The principal question for consideration is whether appellant may use the installment method to report gain on the property she received in exchange for her stock when her wholly owned corporation was liquidated. A secondary question is whether appellant was entitled to defer that portion of the gain which was attributable to the part of the corporate property in which she resided.

On January 3, 1977, and for many years prior thereto, appellant owned all the issued and outstanding stock of Chaparteguy Properties, Inc., a California corporation. The corporation owned a 26-unit motel, which appellant operated. A portion of the motel served as her personal residence. On December 8, 1976, Chaparteguy Properties, Inc., entered into an agreement to sell the motel to an unrelated third party, and on January 3, 1977, the sale was consummated. The purchaser deposited into escrow cash, a check in favor of the corporation, and an installment note for \$285,000 issued to the corporation and secured by a deed of trust.

On January 4, 1977, those items were transferred from escrow directly to appellant, and shortly thereafter the remaining assets of the corporation were also distributed to her. The transfer of all the corporate assets followed a plan of liquidation that had been adopted by the corporation in order to take advantage of the provisions of Revenue and Taxation Code section 24512, which exempted the corporation from recognizing the gain from the sale of the motel.

In line with this overall plan, the corporation's tax return for its 1976-1977 fiscal year excluded the motel sale transaction in its entirety. Instead, the sale was reported on appellant's 1977 return, and the installment method of reporting was apparently elected. Additionally, appellant reported that 12.55 percent of the motel had served as her principal residence and she deferred the gain on that part of the motel pursuant to Revenue and Taxation Code section 18091.

Respondent audited appellant's 1977 return and determined that appellant was not entitled to use the installment method to report the gain from the sale of the motel, but was required to report the face amount of the installment note as gain. Respondent also determined that appellant was not entitled to defer any portion of the gain attributable to the sale of the motel. Appellant protested these determinations, the proposed assessments were ultimately affirmed, and appellant then filed this appeal.

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Section 17401 of the Revenue and Taxation Code, in pertinent part, reads as follows:

(a)(1) Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock.

* * *

(b)(1) For general rule for determination of the amount of gain or loss to the **distribu-**tee, see Section 18031.

(2) **For general** rule for determination of the amount of gain or loss recognized, see Section 18032.

Section 18031, subdivision (a), states that gain from a sale or other disposition is the excess of the amount realized from the transaction **over** the adjusted basis of the property sold or disposed. Subdivision (b) of that section provides that the amount realized must include the sum of money received plus the fair market value of property (other than money) received. Section 18032 states that "[E]xcept as otherwise provided in this part, on the sale or exchange of property, the entire amount of gain or loss, determined under Section 18031, shall be recognized." The fair market value of property such as a note is its face value, unless the taxpayer demonstrates that it should be something else. (Appeal of Carl H., Jr., and Madonna Gross, Cal. St. Bd. of Equal., Aug. 16, 1979.)

The proceeds from the sale of the motel, including the installment note, were distributed to appellant, as part of the complete liquidation of her corporation, in exchange for the stock she owned. The amount realized on that distribution includes the cash, check, and note distributed to her from escrow. Appellant has not shown that the note she received should be valued at any amount other than its face value. Therefore, the entire amount of the distribution, including the face value of the note, must be included in computing the gain reported by appellant in 1977.^{1/}

^{1/} The installment treatment requested by appellant became statutorily permissible in California after January 1, 1981, pursuant to the provisions of Revenue and Taxation Code section 17577, subdivision (h), following an equivalent federal law revision which was made applicable to distributions after March 31, 1980. (26 USCA § 453(h), added by P.L. 96-471.) However, appellant's situation is controlled by the law as it existed in 1977, before these changes took effect.

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The next issue is whether a portion of the gain on the motel may be deferred since part of the motel served as appellant's principal residence. Section 18091 of the Revenue and Taxation Code reads as follows:

If property (hereinafter in the article called "old residence") used by the taxpayer as his principal residence is sold by him after December 31, 1952, and, within a period beginning 18 months prior to the date of such sale and ending 18 months after such date, property (hereinafter in this article called "new residence") is purchased and used by the taxpayer as his principal **residence**, gain (if any) from such sale ~~shall be~~ recognized only to the extent that the taxpayer's adjusted sales price (**as** defined in Section 18092) of the old residence **exceeds** the taxpayer's **cost of** purchasing the new residence. (Emphasis added.)

The plain language of this statute and judicial interpretations of its federal counterpart require that the taxpayer be the one who sells the old residence and purchases the new one. (See Marcell10 v. Commissioner, 380 F.2d 499, 502 (5th Cir.), cert. den., 389 U.S. 1044 [19 L.Ed.2d 8351 (1967); Jean L. May, ¶ 74,054 P-H Memo. T.C. (1974);) In the instant case, the corporation owned the **property** used by appellant as her principal residence, and the corporation sold that property to a third, unrelated party. Appellant would have us disregard the corporate entity and treat the motel property as her own since she was the sole shareholder. However, the corporate entity will generally not be disregarded unless the corporation is a passive "dummy" one or is used for tax avoidance. (Moline Properties v. Commissioner, 319 U.S. 432, 439 [87 L.Ed. 14991 (1943); Lane v. U.S., 535 F.Supp. 397 (S.D. Miss. 1981).) **Appellant** has no-alleged that either of those conditions existed. It must be concluded that appellant simply does not meet the requirements of the statute since she was not the owner of the property with respect to which she seeks deferral of gain. Accordingly, respondent's action must be sustained.

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O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Marie Chaparteguy against a proposed assessment of additional personal income tax in the amount of **\$21,799.58** for the year 1977, be and the same is hereby sustained.

Done at Sacramento, California, this 8th day of May, 1984, by the State Board of Equalization, with Board Members Mr. Nevins, Mr. Dronenburg, Mr. Collis, Mr. Bennett and Mr. Harvey present.

<u>Richard Nevins</u>	, Chairman
<u>Ernest J. Dronenburg, Jr.</u>	, Member
<u>Conway H. Collis</u>	, Member
<u>William M. Bennett</u>	, Member
<u>Walter Harvey*</u>	, Member

*For Kenneth Cory, per Government Code section 7.9